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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY COOK, Defendant and Appellant.	B292023 (Los Angeles County Super. Ct. No. PA087539)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Terrell, Judge. Affirmed.

Laura R. Sheppard, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Nancy Lii Ladner, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Timothy Michael Cook (defendant) appeals from the judgment entered after remand for resentencing. He contends that the trial court erred in resentencing him to the high term in place of the middle term. We find defendant's claim to be without merit, and affirm the judgment.

BACKGROUND

Defendant was convicted after a jury trial of possession of a controlled substance in violation of Penal Code section 11377, subdivision (a),[1] a misdemeanor (count 1), and of importing a controlled substance in violation of section 11379, subdivision (a), a felony (count 2). Defendant admitted to having suffered a prior felony conviction of violating section 11379. Pursuant to section 1170, subdivision (h), defendant was sentenced to six years in jail as to count 2, enhanced by three years due to the prior felony conviction, pursuant to former section 11370.2, and to a concurrent term of six months as to count 1. The trial court "split" the sentence on count 2, so that three years would be served in jail, and three years would be served under mandatory supervision, conditioned upon participation in a residential drug treatment facility for nine months to be coordinated by the Probation Department, and on compliance with specified terms and conditions of probation. After defendant was sentenced, section 11370.2 was amended, effective January 1, 2018, to provide that the enhancement for prior felony convictions applied only to a violation of section 11380. (See Stats. 2017, ch. 677.)

Defendant appealed from the judgment, seeking retroactive application of the amended section 11370.2. (See *People v. Cook* (May 4, 2018, B285411 [nonpub. opn.].) We found that the

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

amendment applied to defendant and ordered the trial court to strike the enhancement imposed. We also vacated the sentence to give the trial court the opportunity to reconsider the entire sentence in accordance with the applicable statues and rules, provided that the aggregate term did not exceed the original sentence.

On remand, the trial court summarized its reasoning for imposing the split sentence, as follows:

> "The court ended up doing a split sentence with three years in custody, three years under mandatory supervision including a drug program . . . . At the time of the original sentence, which occurred after trial, the court stated on the record that . . . under the law as it was then in place, the court was looking at a triad of 2-3-4 [years] plus three years for the prior, so the actual triad was 5-6-7, and the court said those sentences seemed unduly harsh; but, on the other hand, the three years that the defense wanted the court felt was too lenient, and the court was looking for a middle ground, and . . . ended up doing a split sentence as a middle ground after conferring with counsel."

The trial court went on to explain that "the middle ground it was looking for [was] between the three years and five years, so the court's indicated is to impose a four-year sentence. No mandatory supervision. No programs." The court also explained that although it could not impose the enhancement, it was taking into consideration the prior conviction in imposing the upper term of four years instead of the middle term of three years. After hearing from counsel, the court imposed sentence as indicated, plus the concurrent six-month term on count 1, for a total aggregate term of four years. Defendant was given 414 actual days of custody and 414 days of conduct credit for a total of

818 days (including the credit granted at the time of the original sentencing).

Defendant filed a timely notice of appeal from the judgment.

DISCUSSION

I. Aggregated sentence

Defendant contends that the trial court abused its discretion in imposing the high term in place of the middle term for count 2. He first contends that the new upper term sentence violated the rule that although upon resentencing, the court may not impose a term higher than the original aggregate sentence. (See *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1253 (*Burbine*).) We reject defendant's contention for the reasons that follow.

"[W]hen part of a sentence is stricken on review, on remand for resentencing 'a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.' [Citations.]" (*People v. Buycks* (2018) 5 Cal.5th 857, 893; see also *People v. Navarro* (2007) 40 Cal.4th 668, 681.) The California Supreme Court has named this rule, the "'full resentencing rule,'" under which, the trial court may "'modify every aspect of the defendant's sentence on the counts that were affirmed, including the term imposed as the principal term.'" (*Buycks*, at p. 893.) The trial court may "reconsider[] its prior sentencing choices made under the normal rules of felony sentencing, including imposing a higher term for the principal, or base, term, so long as the total prison term for all affirmed counts does not exceed the original aggregate sentence." (*Burbine*, *supra*, 106 Cal.App.4th at p. 1253.)

The same rule applies when, as here, resentencing is ordered due to imposition of an improper enhancement. (See

People v. Castaneda (1999) 75 Cal.App.4th 611, 614 (*Castaneda*).) "'When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components.' [Citations.]" (*Burbine*, *supra*, 106 Cal.App.4th at p. 1258.)

Defendant recognizes these principles, but focuses on the use of the words, "aggregate prison term" in *Burbine*, and on the use of that and similar phrases in other cases. (See, e.g., *People v. Cortez* (2016) 3 Cal.App.5th 308, 312 ["aggregate term of imprisonment" and "aggregate prison term"]; *People v. Roach* (2016) 247 Cal.App.4th 178, 184 [same].) Defendant notes that the rule was developed prior to the Criminal Justice Realignment Act of 2011 (Realignment), which now permits a felony sentence to be served in county jail and to be split, so that part of the sentence is executed and part of it is suspended. (See § 1170, subd. (h)(5)(B).) Defendant argues that because there was no provision to split a felony sentence prior to Realignment, the phrase, aggregate *prison* term, must be construed in the current context to refer to only to the portion of a split sentence to be served in custody.

"'Our fundamental task in interpreting a statute is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment.'" (*People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1421-1422.)

In general, "a sentence includes more than the length of the term of confinement. [Citation.]" (*People v. Scott* (2014) 58 Cal.4th 1415, 1424.) Moreover, "there is but a single act of sentencing in a criminal case." (*People v. Wilcox* (2013) 217 Cal.App.4th 618, 625.) There is no language in section 1170 which indicates that mandatory supervision was intended by the Legislature to be a separate creature and not part of the sentence. On the contrary, section 1170, subdivision (h)(5)(B) defines "mandatory supervision" as "[t]he *portion* of a defendant's *sentenced term* that is suspended pursuant to this paragraph . . . ." (Italics added.) Moreover, the Legislature expressly provided in section 667.5, subdivision (b), the suspended portion of the term imposed under section 1170, subdivision (h)(5)(B) "'to allow mandatory supervision, shall qualify . . . for the purposes of the one-year enhancement.'" (*People v. Rahbari* (2014) 232 Cal.App.4th 185, 192, fn. omitted.) Thus it "'generally is the equivalent of a prison sentence.'" (*Ibid.*; see also *People v. Fandinola*, *supra,* 221 Cal.App.4th at pp. 1422-1423 [mandatory supervision is "akin to a state prison commitment"].)

Furthermore, "[i]t is a settled principle of statutory construction that the Legislature "'is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof. [Citation.]" [Citation.]' [Citation.]" (*People v. Scott, supra*, 58 Cal.4th at p. 1424.) The Legislature made clear in providing for split sentences and mandatory supervision that it was aware of pre-Realignment judicial decisions by stating that the sentencing court could, in its discretion, sentence the defendant to a "term as determined *in accordance with the applicable sentencing law*, but suspend execution of a concluding portion of the term selected" and place the defendant on mandatory supervision. (*People v. Mendoza* (2015) 241 Cal.App.4th 764,787, fn. 4, quoting former

§ 1170, subd. (h)(5)(B)(i); see Stats. 2013, ch. 508, § 5; Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 12.) Applicable sentencing law included the myriad pre-Realignment cases cited by the California Supreme Court when observing that in cases considering recalled sentences, provisions of section 1170, subdivision (d), "the Courts of Appeal have concluded that . . . the resentencing court has jurisdiction to modify *every* aspect of the sentence, and not just the portion subjected to the recall. [Citations.]" (*People v. Buycks, supra*, 5 Cal.5th at p. 893, citing *Burbine*, *supra*, 106 Cal.App.4th at p. 1258; *People v. Sanchez* (1991) 230 Cal.App.3d 768, 772; *People v. Stevens* (1988) 205 Cal.App.3d 1452, 1457-1458; *People v. Hill* (1986) 185 Cal.App.3d 831, 834.)

We conclude from the foregoing that the Legislature intended that what is now known as the full resentencing rule to apply in the same manner as recalled sentences to the executed and suspended portions of the sentenced term under section 1170, subdivision (h)(5)(B). We also conclude that the Legislature also intended that such combined portions be the "original aggregate sentence" for purposes of applying the rule of *Burbine, supra*, 106 Cal.App.4th at page 1253. As defendant's new sentence was four years in jail with no mandatory supervision, it did not exceed the original aggregated sentence of six years.

II. The court's exercise of discretion

Defendant contend that the trial court abused its discretion in imposing the high term of four years because "there were no new facts about [defendant's] conduct in jail or since the trial that were presented, and defense counsel requested that the remaining three year sentence be affirmed as his total sentence."

It is the appellant's burden to demonstrate that the trial court's decision was irrational, arbitrary, or not "'grounded in

reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977 (*Alvarez*).) "'In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.] Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]' [Citation.]" (*Id.* at pp. 977-978.)

Defendant argues that it was an abuse of discretion and a denial of due process to increase the term of custody based solely upon the same facts before the court at the time of original sentencing. He contends that absent such evidence it must be presumed that the new sentence was "vindictive retaliation for defendant's having taken a successful appeal. [Citations.]" (*People v. Craig* (1998) 66 Cal.App.4th 1444, 1447, citing *North Carolina v. Pearce* (1969) 395 U.S. 711, 723-725, overruled on other grounds in *Alabama v. Smith* (1989) 490 U.S. 794, 795, 799-801.) No such presumption arises where the defendant's new sentence is less than the original *aggregate* sentence. (See *Craig*, at p. 1448.) As discussed in the previous section, the new sentence imposed in this case was not more severe than the original aggregated sentence. Thus no presumption of vindictiveness arises.

When, as here, an enhancement has been stricken on remand, the sentencing court may consider a proven enhancement allegation as a factor in aggravation to impose the high term in place of the middle term. (*Castaneda*, *supra*, 75 Cal.App.4th at pp. 614-615.) In *Castaneda* for example, the trial

court imposed a three-year great bodily injury enhancement, but on resentencing, the trial court did not impose the great bodily injury enhancement, and instead considered the victim as a factor in aggravation. (*Id*. at p. 614.) The trial court did the same here, considering defendant's prior conviction as a factor in aggravation, instead of using it as an enhancement. The court also relied on its prior opinion that a sentence of three years was too lenient, but a sentence of five or more years which would be imposed due to the enhancement would be unduly harsh. The court indicated that it would have preferred a four-year sentence, but could not reach that result under the then applicable sentencing rules, so the split sentence was a middle ground.

Under such circumstances, there has been no showing that the trial court's exercise of discretion was irrational, arbitrary, lacking in reasoned judgment, or contrary to the appropriate legal principles, and we would thus be unwarranted in disturbing the court's discretion. (*Alvarez*, *supra*, 14 Cal.4th at pp. 977-978.)

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT